No.

IN THE

Supreme Court of the United States

MARIE INEZ CRAVENS, et al,

Petitioners,

v.

CITY OF LA MARQUE, TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Immediately after notice of claim, the City of La Marque, Texas fired Officer Ontiveros for violating its "official" DWI arrest policy. Apparently, the officer did not arrest as required by the "official" policy because the impaired driver, Cravens, was the brother of a fellow police officer. After being released by the officer, Cravens drove from the scene and moments later ran head-on into on-coming traffic and later died. Petitioners accused the City of tacitly condoning this "special favors" to family members "don't arrest" practice both before and after the Cravens' incident. Under these circumstances, petitioners present the following questions for this Court's review:

1. Whether a city owes a DeShaney "state-created danger" duty to protect an impaired driver when the police (i) cut-off the driver's private sources of aid, then (ii) release him to drive, knowing he poses a danger to himself and others.

2. Whether a city owes a DeShaney "special relationship" duty to prevent an impaired driver from driving once the police (i) detain the driver and (ii) have probable cause to arrest.

PARTIES TO THE PROCEEDING

The parties below and here are:

Petitioners are Marie Inez Cravens, individually and on behalf of the Estate of Abner Cravens, Deceased and all wrongful death and survival action beneficiaries including Tony Cravens, Natasha Cravens and Lorreta Cravens, as next friend of L C, a minor.

Respondent is the City of La Marque, Texas.

RULE 29.6 STATEMENT

Petitioners are natural persons and thus are not corporations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

PARTIES TO THE PROCEEDING. ii

RULE 29.6 STATEMENT. ii

TABLE OF AUTHORITIES. v

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 1

STATEMENT. 2

A. Proceedings Below 3

B. The Pleaded Facts 4

REASONS FOR GRANTING THE PETITION. 6

I. The Circuits Are Divided Over the "State-Created Danger" Theory 6

A. Only the Fifth Circuit Has Refused to Recognize the "State-Created Danger" Theory 6

Page

B. The Fifth Circuit's Opinion Squarely Turned on Whether the "State-Created Danger" Theory Exists 7

C. Only This Court Can Bring Uniformity to This Vital Scheme of Constitutional Protections and Remedies 8

II. The Fifth Circuit Erred in Declaring that the "State-Created Danger" Theory Does Not Exist 9

A. DeShaney Clearly Recognized the "State-Created Danger" Theory 9

B. All the Other Circuits Have Declared that DeShaney Recognized the "State-Created Danger" Theory 10

C. Petitioners Properly Pleaded the "State-Created Danger" Theory 10

III. The Fifth Circuit Erred in Implicitly Ruling that DeShaney's "Special Relationship" Duties Do Not Extend to Investigative Stops 10

IV. Once a Duty is Found to Exist, Disposing of the Case Under a 12 (b)(6) Motion is Premature and Wrong. 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) 6

Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989), overuled on other grounds by, White v. Lemacks, 183 F.3d 1253, 1256 (11th Cir. 199) 6

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) . . . . . i, 3, 9 -12

Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993) 6

Frances-Colon v. Ramirez, 107 F.3d 62, 63-64 (1st Cir. 1997) 6

Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990) 6

Kallstrom v. City of Columbia, 136 F.3d 1055, 1066-67 (6th Cir. 1998) 6

Kneipp v. Tedder, 95 F.3d 1199, 1201, 1208 (3d Cir. 1996) 6, 8, 9

McClendon vs. City of Columbia, 305 F.3d 314 (5th Cir. 2002) 6, 7, 9

Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir.) (en banc), cert. denied, 516 U.S. 994 (1995) 6

Page

Reed v. Gardner, 986 F.2d 1122, 1125
(7th Cir. 1993) 6

Rios v. City of Del Rio, Texas, 444, F.3d 417
(5th Cir. 2006) 6, 9

Saenz v. Heldenfels Bros., Inc., 183 F.3d 389
(5th Cir. 1999) 7

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514
(2002) 13

Uhlrig v. Harder, 64 F.3d 567, 572
(10th Cir. 1995) 6

Wood v. Ostrander, 879 F.2d 583, 590
(9th Cir. 1989) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV, cl. 1 ..... 1, 3

STATUTES & RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

42 U.S.C. § 1983 ..... 2, 3, 7, 9

Fed. R. Civ. P. 12 (b)(6) ..... iv, 1, 4, 12

OTHER AUTHORITIES

159 A. L. R. Fed. 37, "State-created Danger,"
or Similar Theory, as Basis for Civil Rights Action
under 42 U.S.C.A.§ 1983 7

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The court of appeals' opinion affirming the district court's order of dismissal was not reported. (App., *infra,* 1a - 2a). The district court's order of dismissal granting defendant's 12 (b)(6) motion was not reported. (App., *infra,* 3a - 18a).

JURISDICTION

The court of appeals' judgment was entered on March 16, 2007. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first section of the Fourteenth Amendment to the United States Constitution establishes that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioners sued the City of La Marque, Texas ("the City") seeking wrongful death and survival action damages for improperly establishing and implementing its DWI policies and practices. The district court correctly exercised subject matter jurisdiction because petitioners sought remedies under 42 U.S.C. §1983 for the alleged violation of petitioners' Fourteenth Amendment substantive due process rights. 28 U.S.C. §§ 1331 and 1343 vested the district court with original jurisdiction to hear these federal claims.

A. Proceedings Below

Petitioners asserted two legal theories against the City:

1. Breach of the "state-created danger" DeShaney duty; and,
2. Breach of the "special relationship" DeShaney duty.

The court of appeals affirmed the district court's judgment declaring:

> [T]he appellants failed to establish that a § 1983 cause of action exists in the Fifth Circuit on the state-created-danger theory under these facts. (App., 2a).

Implicitly, the court also rejected the DeShaney "special relationship" theory of liability arising when the officer detained Cravens for investigation of DWI.

Petitioners alleged the City was directly liable for the wrongful conduct of its police officer for:

(1) the City's pre-accident conduct which led to Ontiveros' incompetent action and wilful neglect of duty, and

(2) the City's post-accident ratification of Ontiveros' incompetent action and wilful neglect of duty.

As to the City's pre-accident conduct, petitioners accused the City, *inter alia*, of tacitly condoning the practice of granting "special favors" to family members of its department. (App. 32a). This "don't arrest" practice encouraged the officer to not arrest Cravens (the brother of a fellow City police officer), even though the official policy of the City required arrest. The

City should have made it plain that there were no exceptions to its official DWI arrest policy, but did not. The City lived with a known double standard before this accident.

As to the City's post-accident conduct, the complaint alleged the City's initial inaction (no discipline whatsoever) constituted a ratification of Officer Ontiveros' wrongful action and proved to be consistent with the City's pattern, practice or custom of giving "special favors" to the family of fellow officers. Not until the City was threatened with suit two months after the accident did the City take any substantive action to try and protect itself from liability; to wit: they fired Ontiveros for incompetence and wilful neglect of duty. These late efforts were a subterfuge to try and hide the City's direct wrongful conduct that led to the death of Cravens. (App. 33a).

The City filed no answer in the case, but instead moved for dismissal under Fed. R. Civ. P. 12 (b)(6). The district court held no scheduling conference in the case or any hearings on the motion. There is no transcript to review.

Since the district court disposed of the case under 12 (b) (6), the live complaint establishes the relevant facts for consideration.

B. The Pleaded Facts

These facts are taken from the complaint, albeit edited and paraphrased for brevity (App., 23a -25a):

> On October 13, 2003, Abner Cravens rear-ended a vehicle driven by his cousin in La Marque, Texas. After the accident, his cousin and others were concerned about the safety of Cravens because he appeared to be intoxicated.

> The La Marque police came to the scene. At the scene, Officer Ontiveros was told that Cravens seemed to be intoxicated and needed help. Ontiveros observed Cravens' condition and knew that Cravens was in no condition to continue to drive his vehicle. Ontiveros advised that he would take care of the situation. Those at the scene believed Officer Ontiveros and left Cravens' well-being in the hands of Ontiveros.
>
> Ontiveros detained Cravens for questioning for several minutes and acquired probable cause to arrest Cravens for DWI, but failed to do so. Ontiveros released Cravens and allowed him to continue driving his vehicle even though Cravens posed a danger to himself and others.
>
> But for the intervention of Officer Ontiveros, Cravens' family member, friends and concerned citizens in the small community of La Marque, Texas would have continued looking out for the safety of Cravens and made sure that he was driven from the scene and given proper medical care where he would have been safe. Cravens was in a worse position after Officer Ontiveros intervened than Cravens would have been had Officer Ontiveros not done so.
>
> Shortly after being released by Officer Ontiveros, Cravens crossed the center line and ran head-on into oncoming traffic resulting in severe injuries from which he ultimately died several days later.

The entire complaint appears at App., 19a - 37a. The district court assumed that Cravens voluntarily intoxicated himself. The voluntariness (or not) of his intoxication is not

supported by the complaint at issue. There may be other good faith reasons for his involuntary intoxication.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over the "State-Created Danger" Theory

A. Only the Fifth Circuit Has Refused to Recognize the "State-Created Danger" Theory

The court of appeals for the Fifth Circuit has never recognized the "state-created danger" theory. Rios v. City of Del Rio, Texas, 444, F.3d 417 (5th Cir. 2006); McClendon vs. City of Columbia, 305 F.3d 314 (5th Cir. 2002) ("The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it." dissenting opinion of Judge Parker).

Every other circuit has recognized the "state-created danger" theory. Frances-Colon v. Ramirez, 107 F.3d 62, 63-64 (1st Cir. 1997); Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993); Kneipp v. Tedder, 95 F.3d 1199, 1201, 1208 (3d Cir. 1996); Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir.) (en banc), cert. denied, 516 U.S. 994 (1995); Kallstrom v. City of Columbia, 136 F.3d 1055, 1066-67 (6th Cir. 1998); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 54-55 (8th Cir. 1990); Wood v. Ostrander, 879 F.2d 583, 590 (9th Cir. 1989); Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356 (11th Cir. 1989), overuled on other grounds by, White v. Lemacks, 183 F.3d 1253, 1256 (11th Cir. 199); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001). See also 159 A. L. R. Fed. 37, "State-created

Danger," or Similar Theory, as Basis for Civil Rights Action under 42 U.S.C.A.§ 1983.

B. The Fifth Circuit's Opinion Squarely Turned on Whether the "State-Created Danger" Theory Exists

The court of appeals has been criticized for avoiding the issue of whether the "state-created danger" theory exists in the Fifth Circuit. See, e.g., McClendon, supra, (dissenting opinion of Judge Parker). However, in this case, the court's opinion turned on only one issue: "[no] § 1983 cause of action exists in the Fifth Circuit on the state-created-danger theory under these facts." (App., 2a).

Though the court cites Saenz v. Heldenfels Bros., Inc., 183 F.3d 389 (5th Cir. 1999) to support its ruling, (App., 2a), the facts of Saenz are importantly different from petitioners' case. In Saenz, the court held there was no constitutional violation when a senior deputy sheriff ordered his junior deputy not to arrest or investigate a known drunk driver who moments later drove his vehicle into oncoming traffic. Significantly, in Saenz, the police did not cut-off any private aid to the drunk driver. Therefore, there was no affirmative action. As well, the drunk driver was never stopped, detained, investigated or had liberties in any way restricted. So the police never formed any official relationship with the drunk driver.

In contrast, the officer in this case cut-off Cravens' private aid that very well may have saved Cravens' life. As well, the officer detained Cravens for questioning, thereby restricting Cravens' liberty and establishing an official relationship with Cravens. This detention triggered constitutional duties by either (1) increasing the danger to Cravens or (2) establishing an official "special relationship" that required the officer to do

his duty: arrest and protect or at least return Cravens to his private aiders.

These facts make it plain that the court affirmed the district court's ruling because the court refuses as a matter of law to recognize the "state-created danger" theory declared in DeShaney.

C. Only This Court Can Bring Uniformity to ThisVital Scheme of Constitutional Protections and Remedies

Only this Court can bring uniformity to this vital scheme of constitutional protections and remedies that hold government accountable for its wrongs. This remedy as applied in other circuits encourages the state to properly manage police power through accountability. Accountability leads to better conduct. Better conduct saves lives. Not only are petitioners entitled to their remedy, but the people are entitled to the benefits of uniform rules that hold the police accountable for their wrongs. The good people of the states of Texas, Louisiana and Mississippi are entitled to the same constitutional protections and remedies as those citizens living in the other 47 plus states, territories and district. Like King George, the Fifth Circuit has had plenty of opportunities to correct the error of its ways but refuses to do so. Therefore, only this Court can make things right.

Had Cravens lived in any other circuit, petitioners would be entitled to constitutional remedies. For example, consider the facts of Kneipp v. Tedder, 95 F.3d. 1199 (3d Cir. 1996). A police officer stopped an obviously intoxicated woman walking home with her husband, then required the husband to go home without his wife. The officer later released the wife to find her way home alone in cold weather. She never made it home.

She died from exposure and was found dead in a ditch. The Kneipp court held that the officer's actions could qualify as the requisite affirmative action for purposes of a "state-created danger" claim under 42 U.S.C. § 1983.

The facts of Kneipp are almost identical to petitioners' case: Cravens' cousin and others were helping him, the police arrived, cut-off his private aid, detained him, then released him to his ultimate death. In other circuits, there would be accountability for this wrong, but not in the Fifth Circuit. There is no accountability for this wrong here. There is no remedy. Instead of looking to the law for protection, we are forced to rely upon the goodwill and competence of the government for our safety and proper treatment.

II. The Fifth Circuit Erred in Declaring that the "State-Created Danger" Theory Does Not Exist

A. DeShaney Clearly Recognized the "State-Created Danger" Theory

> "While the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 201, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)

Chief Justice Rehnquist was of course, not creating new rights under the Constitution in DeShaney, but was simply seeing what our Constitution and history make plain: the Constitution was amended to protect the people from wrongful governmental conduct. When the police power is wrongly used affirmatively to cause harm to one's body, the people are entitled to hold the government accountable for that wrong.

This right arises not from the words of Chief Justice Rehnquist, but from the very fabric of our social contract. Our Constitution is merely some evidence of our rights as citizens manifested by reference to the well-understood and evolving term "due process." The full substantive contours of the term manifest as concrete facts emerge. *ex facto jus oritur.* In this area of law, the court of appeals seems to have lost sight of this basic principle of judicial decision making. The court continually refuses to embrace the lessons of DeShaney and refuses to submit itself humbly to DeShaney's precedential authority.

B. All the Other Circuits Have Declared that DeShaney Recognized the "State-Created Danger" Theory

As noted, supra, I. A., all the other circuits have submitted to the "state-created danger" precedent set by DeShaney.

C. Petitioners Properly Pleaded the "State-Created Danger" Theory

Though the "state-created danger" theory has not been declared to exist in the Fifth Circuit, the district court determined that petitioners properly pleaded its elements. (App. 15a). Therefore, satisfaction of the elements is not the issue. Petitioners ask this Court to declare that the cause of action exists. Their remedies on remand will naturally follow.

III. The Fifth Circuit Erred in Implicitly Ruling that DeShaney's "Special Relationship" Duties Do Not Extend to Investigative Stops

In affirming the district court's dismissal with prejudice, the court of appeals implicitly rejected petitioners' argument

that Cravens' detention was sufficient to trigger duties under DeShaney's "special relationship" theory.

This Court should hold that Officer Ontiveros' action of detaining Cravens for questioning was sufficient to trigger DeShaney "special relationship" duties. Detaining persons pursuant to accident investigation necessarily limits their liberty and thus should be sufficient to trigger DeShaney "special relationship" duties. Consider this illustration: if a police officer detained a driver for questioning on the side of the road and required the detained person to stand between his vehicle and the officer's vehicle and suffered harm thereby, would not the officer be liable under DeShaney's "special relationship" theory for affirmatively causing the driver to stand in the "kill zone" against his will? The DeShaney "special relationship" duty needs to be imposed to the extent of the state's degree of control (via police power) over the individual citizen. The issue should be control and how that control causes harm. This control test is suggested by the language of "*or puts some other similar restraint on an individual's personal liberty by the affirmative exercise of state power such that he cannot act on his own behalf.*" DeShaney at 199-200.

In this case, Ontiveros detained Cravens for questioning. Cravens was not free to leave without Ontiveros' permission. No one was permitted to help Cravens and he could not help himself at this point. These facts show that Ontiveros exercised control over Cravens to a significant degree. Liability should attach to the extent that his official control over Cravens caused harm. Fundamentally, affirmatively exercising control that emanates from the police power should give rise to a duty to properly exercise that control. This principle comes from basic tort law and should be applied here constitutionally.

Of course, Cravens may share some responsibility for being impaired. But it is up to a jury to weigh the evidence and apportion responsibility. As a matter of law, one cannot say that Cravens' harm was all his own fault at the 12 (b)(6) stage. Can we not trust a jury to properly sort these matters? If it were all Cravens' fault and he deserved to die at his own hand, then why did the City fire Ontiveros for incompetence and wilful neglect of duty?

Alternatively, this Court should hold that because Ontiveros had an absolute duty to arrest under the City's "official" DWI policies, Cravens was in a state of de jure or constructive arrest. Therefore, Ontiveros had a DeShaney "special relationship" duty to protect via arrest or at least after detention, return Cravens to the safety of his private aiders.

IV. Once a Duty is Found to Exist, Disposing of the Case Under a 12 (b)(6) Motion is Premature and Wrong.

Ultimately, the district court treated the conduct of the officer as an isolated incident, not properly attributable to the City. (App. 16a). However, once this Court resolves the duty issue, petitioners should be allowed to advance beyond the 12 (b)(6) stage and conduct full-blown discovery to see how the customs, practices and policies of the City led to the officer's manifest incompetence and wilful neglect of duty. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (A 12 (b)(6) motion should not be granted or affirmed unless it appears to a certainty that the plaintiffs would not be entitled to recover under any state of facts that could be proved to support the claim).

The district court did not consider that Cravens had a brother on the City's police force. Apparently, this relationship caused Ontiveros to extend a "special favor" to Cravens' police

officer brother by not arresting Cravens. Petitioners pleaded that the City apparently had an unwritten policy or practice of allowing officers to extend "don't arrest" "special favors" to family members of fellow law enforcement officers. (App. 32a). This unwritten policy or practice may have motivated Ontiveros to release Cravens. Thus, there is a plausible link between the policies and practices of the City and Ontiveros' manifest incompetence and wilful neglect of duty.

CONCLUSION

Had the Fifth Circuit chosen to submit itself to the authority of this Court's DeShaney opinion and the persuasive authorities of her sister courts, it would not be necessary for petitioners to seek relief here. Petitioners greatly appreciate the workload of this Court. However, the Fifth Circuit refuses to change its course and therefore, petitioners have no choice but to ask this Court for relief. Beyond the needs of petitioners, this case gives the Court an excellent opportunity to resolve the current and ongoing conflict over the "state-created danger" theory. Please grant the petition and after review resolve the conflict by reversing the judgment of the United States Court of Appeals for the Fifth Circuit and remanding the case to the district court for further proceedings consistent with this Court's opinion and rulings.

Respectfully submitted,

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